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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ERNEST CASIQUE, Defendant and Appellant.	B284052 (Los Angeles County Super. Ct. No. MA066123)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed as modified.

Michael Allen and Kathy R. Moreno, under appointments by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Ernest Casique appeals from a judgment of conviction following a jury trial. The jury found defendant guilty of first degree felony murder and second degree robbery. The jury also found firearm and gang allegations to be true.

Defendant contends that recently enacted law amending accomplice liability for felony murder, Senate Bill No. 1437 (SB 1437; Stats. 2018, ch. 1015, §§ 2, 3), requires that his conviction for felony murder be vacated. Alternatively, defendant argues that the trial court erred in delivering CALJIC No. 8.27, the felony murder instruction, because the instruction permitted the jury to convict him without finding that he aided and abetted his codefendant, Andrew Cachu, in the robbery. Defendant asserts there was insufficient evidence to support the true findings on the gang allegations against him under Penal Code[1] section 186.22. Defendant also argues that his case should be remanded for the trial court to exercise its discretion whether to strike the firearm sentence enhancements under section 12022.53, subdivision (h), and that the trial court should have stricken, rather than stayed, two firearm sentence enhancements and the gang sentence enhancement. Finally, defendant contends the trial court erred by imposing certain fines and fees without a prior determination that he had an ability to pay.

We agree with defendant that there was insufficient evidence to support a true finding for the gang allegations. We will modify the judgment to strike the gang sentence enhancements under section 186.22, subdivision (b), and the gang

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[1] Further statutory references are to the Penal Code unless otherwise noted.

related firearm sentence enhancements under section 12022.53, subdivisions (b), (c), (d), and (e)(1). We otherwise affirm the judgment as modified.

II. BACKGROUND

A. *Procedural History*

On July 7, 2016, the Los Angeles County District Attorney filed a two-count amended information against defendant and Cachu. Both defendants were charged in count 1 with murder (§ 187, subd. (a)), and in count 2 with second degree robbery (§ 211) of the murder victim, Louis Amela. The District Attorney alleged firearm allegations for count 1 based on the use and discharge of a firearm by a principal causing great bodily injury pursuant to section 12022.53, subdivisions (b), (c), (d), and (e)(1); a gang allegation pursuant to section 186.22, subdivision (b)(4) for count 1; and a gang allegation pursuant to section 186.22, subdivision (b)(1)(C) for count 2.

Defendant pleaded not guilty and proceeded to jury trial with codefendant Cachu. On July 20, 2016, the jury found defendant guilty of first degree felony murder and second degree robbery. The jury found all firearm and gang allegations to be true. The jury also found Cachu guilty on both counts and found the sentencing enhancements to be true.

On July 10, 2017, the trial court sentenced defendant to 25 years to life on count 1, and imposed a consecutive 25-year enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1) (intentional discharge of a firearm causing great bodily injury), for a total term of 50 years to life in state prison. The

court further applied enhancements pursuant to sections 186.22, subdivision (b) (gang sentence enhancement of 10 years), and 12022.53, subdivisions (b), (c), and (e)(1) (firearm sentence enhancements of 10 and 20 years), although the court stayed these latter enhancements pursuant to section 654.

On count 2, the court sentenced defendant to five years, with a consecutive 10-year enhancement pursuant to section 186.22, subdivision (b). The court also stayed the sentence for count 2 pursuant to section 654.

The court imposed various fines and fees and credited defendant 774 days of presentence actual custody credit.

B. *Prosecution Case*

1. The Robbery and Shooting

Cachu's brother was in a relationship and had a child with defendant's sister. Defendant spent a lot of time with Cachu and his girlfriend Kaylee Fuentes.

On March 31, 2015, Fuentes and Cachu "met up" with Silverio Rodriguez-Garcia and Carlos Monroy. Cachu, Rodriguez-Garcia (known as "Danger") and Monroy (known as Tony and "Toker") were all members of the Down as Fuck (DAF) gang. Defendant, also known as "Boxer," was a member of the Palmas 13 Kings (Palmas) gang. At 8:30 p.m., that day, all four individuals drove in Fuentes's car to defendant's house. When the DAF members arrived at his house, defendant asked Cachu, who was driving, if he could give defendant a ride to Palmdale Boulevard (in Palmdale, California) so that he could find someone who had argued with defendant's friend or friends earlier that

day. Defendant did not give a name, a nickname, a gang name, or a description of the person he was looking for. Cachu agreed, and defendant sat in the back seat on the passenger side.

Cachu drove the group on Palmdale Boulevard, heading east. As the group passed a Sky Burger restaurant, defendant said, "He's right there, let me out." Cachu drove the car to a nearby Yum Yum Donuts's parking lot. Toker, Danger, and Cachu exited the vehicle with defendant. Cachu told Fuentes to drive the car and meet them at the Sky Burger restaurant. The four men then walked towards the restaurant.

Nicole King, Amela's girlfriend, was at Sky Burger buying food at the time. King described Amela as an inactive member of an unnamed gang from North Hollywood. Amela, however, lived in Palmdale and traveled by bicycle to meet King at the restaurant. Amela left the bicycle against the wall outside near the doors. King ordered food and sat down by the windows near the bicycle while Amela stood nearby. Defendant entered the restaurant and made a loud ruckus at the counter. Defendant then walked out, hitting the doors loudly with his hands. King saw Amela run outside, and she followed. Amela chased after defendant, who had taken his bicycle.[2] Amela caught defendant, and the two began punching each other. Fuentes, who had arrived in her car by this time, saw Amela punching defendant. After a few minutes, two more individuals, including Cachu, approached the combatants. Defendant and one of the individuals grabbed Amela, and Cachu shot Amela twice in the

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[2] Fuentes initially identified Cachu as the individual who took Amela's bicycle. However, she later testified that the individual who took the bicycle was the same one who fought with Amela, and that person was defendant.

back. After the shooting, defendant jumped up and down, saying, "Yeah." King saw defendant ride away with Amela's bicycle. Amela died of a gunshot wound to his chest; a bullet perforated his lungs and heart.

2. Cachu's Statements to Undercover Officers

The District Attorney introduced evidence of a recorded conversation between Cachu and undercover Los Angeles County Sheriff's deputies Castro and Magdaleno, from May 19, 2015, at the Men's Central Jail. Cachu told the deputies that he was charged with murder and admitted to being a DAF member. Cachu said that the police had him for covering up bullet holes in his girlfriend's car. Cachu stated that he shot Amela twice, once in his chest or stomach. A uniformed deputy then entered the jail cell to inform Cachu to change clothes for a lineup. Deputy Castro then began speaking with the uniformed deputy about topics unrelated to Cachu. After the uniformed deputy left, Deputy Castro and Cachu then engaged in the following exchange:

"CASTRO: Gang shit or no?

"CACHU: Yeah.

"CASTRO: Neighborhood shit?

"CACHU: Yeah."

The uniformed deputy then returned, and Cachu exited the cell for the lineup. After the lineup procedure concluded, Cachu returned to the cell. When Deputy Castro asked about the incident, Cachu explained that he had four "homies" with him during the event: "[I]t wasn't even supposed to go down like that. We weren't supposed to do it like that. We tried . . . to take one of

the homie['s] bikes . . . and . . . he goes heading toward us. And you know what happened? We were caught there . . . . And, well, that homey was gonna run up, take his bike . . . and just—yeah." Cachu identified defendant and defendant's brother as members of Palmas.

III. DISCUSSION

A. *Defendant May Seek Relief Under SB 1437 by a Section 1170.95 Petition, Not by this Appeal*

During the pendency of this appeal, SB 1437 was signed into law. SB 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) Substantively, SB 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder and addresses liability for murder. It also adds section 1170.95, which allows those "convicted of felony murder or murder under a natural and probable consequences theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts . . . ." (§ 1170.95, subd. (a).) After SB 1437 was signed, defendant, with our permission, filed a supplemental brief in which he contends insufficient evidence supports his murder conviction in light of SB 1437's amendments.

We adhere to our holding in *People v. Martinez* (2019) 31 Cal.App.5th 719, 729, that SB 1437's enactment of the petitioning procedure in section 1170.95 means the changes worked by the legislation do not apply retroactively on direct appeal. Defendant is entitled to pursue the procedure set forth in section 1170.95, but he is not entitled to SB 1437 relief without doing so.

B. *Trial Court Did Not Err in Delivering CALJIC No. 8.27*

Defendant next contends that the trial court erred in instructing the jury with CALJIC No. 8.27, which describes felony murder.[3] We review de novo whether a jury instruction

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[3] The trial court instructed the jury as follows:

"If a human being is killed by any one of several persons engaged in the commission of the crime of robbery, all persons who either directly and actively commit[] the act constituting that crime, or who, at or before the time of the killing, with knowledge of the unlawful purpose of the perpetrator of the crime, and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aided, promoted, encouraged[,] or instigated by act or advice its commission are guilty of the murder in the first degree, whether the killing is intentional, unintentional, or accidental.

"Before a non-killer may be found guilty of murder pursuant to the felony murder rule, there must be a causal and temporal relationship between the underlying felony and the act resulting in death.

"The causal relationship requires some logical connection between the killing and the underlying felony beyond mere coincidence of time and place.

"Temporal relationship requires that the felony and the killing be part of one continuous transaction.

correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218; *People v. Jandres* (2014) 226 Cal.App.4th 340, 358.)

Defendant contends that CALJIC No. 8.27 improperly permitted the jury to convict him of felony murder without finding that he aided and abetted Cachu in the robbery. According to defendant, CALJIC No. 8.27 "did not require the jury to find that [defendant] aided and abetted Cachu's participation in the robbery. The jury had only to find [defendant] and Cachu were 'jointly engaged in the commission of the robbery at the time the fatal wound was inflicted.'" Defendant also seems to argue that CALJIC No. 8.27 impermissibly permitted the jury to convict him of murder even if he did not know that Cachu would participate in the robbery and did not encourage him to so participate. We disagree.

To the extent defendant objects to the jury instruction's use of the term "jointly engaged," this is an accurate statement of the law. "[S]ection 189 provides that any killing committed in the perpetration of specified felonies, including robbery, is first degree murder. Under long-established rules of criminal complicity, liability for such a murder extends to all persons 'jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the crime of robbery' (*People v. Martin* (1938) 12 Cal.2d 466, 472 . . .) 'when one of them kills while acting in furtherance of the common design.' (*People v.*

"In order to be guilty of murder as an aider and abettor to a felony murder, the accused and the killer must have been jointly engaged in the commission of the robbery at the time the fatal wound was inflicted.

"However, an aider and abettor may still be jointly responsible for the commission of the underlying robbery based upon other principles of law which will be given to you."

Washington (1965) 62 Cal.2d 777, 782. . . .) (Fn. omitted.)" (*People v. Pulido* (1997) 15 Cal.4th 713, 716.)

If defendant's argument is that CALJIC No. 8.27 permitted the jury to convict defendant even if he did not intend to aid Cachu's participation in the robbery, we also disagree. The first paragraph of CALJIC No. 8.27 explained to the jury that if a human being is killed by a person engaged in the commission of a robbery, "all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree . . . ." This was a correct phrasing of the concept of aiding and abetting in the context of felony murder. It was an accurate statement of the law on felony murder and accomplice liability based on case law from our Supreme Court. (See *People v. Dominguez* (2006) 39 Cal.4th 1141, 1159 [approving of language from prior version of CALJIC No. 8.27 explaining felony murder].)

Moreover, jury instructions are not read in isolation, but must be considered as a whole. (*People v. Franco* (2009) 180 Cal.App.4th 713, 720.) Here, the trial court also delivered CALJIC No. 3.01, which further defined aiding and abetting.[4]

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[4] The court instructed the jury:

"A person aids and abets the commission of a crime when he or she:

"Number one, with knowledge of the unlawful purpose of the perpetrator;

This instruction informed the jury that they were required to find that defendant intended to encourage or facilitate the commission of the crime. The jury was thus properly instructed on the legal requirements for finding defendant liable as an aider or abettor to the robbery. The trial court thus did not err in delivering CALJIC No. 8.27.

C. *Insufficient Evidence to Support True Finding of Gang Allegation*

Defendant contends there was insufficient evidence to support true findings for the gang allegations pursuant to section 186.22, subdivision (b)(1), which provides a sentencing enhancement for felonies "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) To prove the crime was "gang[]related," the prosecution need only prove one of

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"And number two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime;

"Number three, by act or advice, [aids], promotes, encourages[] or instigates the commission of [the] crime.

"A person who aids and abets the commission of a crime need not be present at the scene of the crime. Mere presence at the scene of the crime which does not . . . itself assist the commission of the crime does not amount to aiding and abetting.

"To be guilty as an aider [or] abettor, the defendant's intent or purpose of committing or encouraging or facilitating the commission of the crime by the perpetrator must be formed before or during the commission of the crime. Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

three alternatives: the crime was committed "(1) for the benefit of . . .[,] (2) at the direction of . . .[,] *or* (3) in association with a gang." (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484, citing *People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) We review a challenge to the sufficiency of the evidence in support of a sentence enhancement for substantial evidence. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170.)

Defendant concedes the evidence supports a finding that he was a member of Palmas and Cachu was a member of DAF. Defendant also does not contest that Palmas and DAF were criminal street gangs under section 186.22, subdivision (f). Instead, defendant contends there was insufficient evidence that: (1) the crimes were committed for the benefit of, or in association with, any criminal street gang; and (2) defendant had the specific intent to promote, further, and assist in criminal conduct by gang members. We conclude defendant's first argument is well-taken and persuasive.

"In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048; *People v. Franklin* (2016) 248 Cal.App.4th 938, 948.) An expert may properly "express an opinion, based on hypothetical questions that track[] the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose. 'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the . . . section 186.22, subdivision (b)(1), gang enhancement." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) But "[a] hypothetical question not

based on the evidence is irrelevant and of no help to the jury." (*Id.* at p. 1046.)

Los Angeles County Sheriff's detective Robert McGaughey testified as an expert on the criminal street gangs of DAF and Palmas. The prosecutor asked McGaughey to assume the following hypothetical facts: "So I want you to assume for purposes of a hypothetical that you have three members [of] what I'm going to call Gang One [which, based on the facts of the case, was meant to refer to DAF] . . . [¶] And then you have one member from what I'm calling Gang Two [which, based on the facts of the case, was meant to refer to Palmas]. I want you to further assume that Gang One and Gang Two are affiliated with one another and are both Southern California Hispanic gangs, okay? [¶] I want you to further assume that Gang Two [Palmas] gets disrespected by a member of a different gang, a rival gang or otherwise. And later after that disrespect takes place, a member of Gang Two [Palmas] meets up with three members from Gang One [DAF]. And the member from Gang Two tells the Gang One members that he wants to go out looking for this person who disrespected on his gang members. [¶] He gets into a car with these three members from Gang One and a girlfriend of one of those Gang One members. And the five of them drive around the neighborhood. While they're driving, a short time later, they pass by a restaurant at which time the member of Gang Two tells the driver to stop the car and that he sees someone he wants to confront and tells the driver . . . to stop." The remainder of the hypothetical was based on the facts of this case.

The prosecutor asked, "Based upon the information in that hypothetical, what is your opinion about whether that crime, the robbery of the bike, and the murder of the rival gang member

would be committed for the benefit of, at the direction of or in association with a criminal street gang with the specific intent to promote further or assist in any criminal conduct by gang members?"

McGaughey answered, "Well, my opinion would be, definitely an association with, and for the benefit of gang members from Gang One and Gang Two." McGaughey based his opinion, that the crime benefitted Gang Two (Palmas), on the following: "Benefits of Gang Two because [defendant's] gang was ultimately disrespected in the beginning. So he has—he has to do something about that otherwise, he's perceived as weak, can be perceived as weak from other gang members from Gang Two or even his affiliated gang members from Gang One." The hypothetical questions are unsupported by the evidence.

First, there was no evidence that DAF and Palmas were "affiliated with one another." To the contrary, McGaughey denied that DAF and Palmas were officially allied. McGaughey testified only that Cachu, Toker, and Danger were affiliated with Palmas members, and defendant was affiliated with DAF members.

Second, there was no evidence that Amela had disrespected defendant's fellow gang member or that defendant told the DAF members that he had. The Attorney General contends that "appellant had an unresolved gang grudge against Amela[] for the argument that occurred involving someone the jury . . . could infer to be a member of the Palma[s] 13 Kings[,]" and cites to a portion of Fuentes's testimony in support. We disagree with the Attorney General's characterization of the record. In the section of the transcript cited by the Attorney General, the prosecutor asked Fuentes the following:

"Q. What was the first thing that [defendant] said when he approached your car? [¶] . . .

"A. He said if we could give him a ride.

"Q. Did he say where or for what purpose he wanted a ride? [¶] . . .

"A. Down Palmdale Boulevard. [¶] . . .

"Q. And did he say why he wanted to go down Palmdale Boulevard?

"A. He wanted to go look for someone.

"Q. Did he give you—you or anyone . . . at that time the name of a person that he was looking for?

"A. No.

"Q. Did he give you a description of the person that he was looking for?

"A. No.

"Q. Did he say anything about this person that he was looking for in terms of nickname, or gang name, or anything like that?

"A. No. [¶] . . .

"Q. [D]id [defendant] [say] something specifically as to why he wanted to go out and look for this person [Amela]?

"A. There was an argument that happened earlier between him [Amela] and his friend.

"Q. And with—who is his friend?

"[A.] [Defendant's] friend. [¶] . . . [¶] With [defendant's] friends."

Based on Fuentes's testimony, there was no evidence one way or the other as to whether defendant's friend or friends who had argued with Amela were Palmas gang members. Nor was there any evidence that all of defendant's "friends" were members

of Palmas. The inference suggested by the Attorney General is speculative or conjectural at best. It is therefore insufficient to demonstrate that the hypothetical question was rooted in the facts shown here. (*People v. Richardson* (2008) 43 Cal.4th 959, 1008 [the expert's opinion may not be based "'on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors'"]; see *People v. Sanchez* (2016) 63 Cal.4th 665, 675 ["If an essential fact is not found proven, the jury may reject the opinion as lacking foundation"]; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427 ["[A]ny expert's opinion is only as good as the truthfulness of the information on which it is based"].)

The Attorney General further argues that "the person Amela[] had offended earlier appears to be a member of the [Palmas] gang, because the robbery and murder of Amela[] that took place afterwards was disclosed by Cachu as being motivated by gang-related reasons." We disagree. Cachu's statements reflected his belief that he had been arrested for engaging in "gang shit" or "neighborhood shit." But the statements do not demonstrate that defendant or Cachu had a motive to benefit a gang. Again, the inference asserted by the Attorney General is speculative and conjectural. Cachu's statements are insufficient to demonstrate that defendant's criminal conduct was for the benefit of Palmas or DAF. (*People v. Richardson, supra*, 43 Cal.4th at p. 1008.)

Finally, there was no evidence that Amela was a member of a rival gang. McGaughey, the gang expert, did not testify about Amela's gang membership. Nor was there any evidence that any of the participants in the robbery or murder declared a gang affiliation, flashed a gang sign, or wore gang paraphernalia before, during, or after the crime. Indeed, the only evidence of

Amela's alleged gang membership was provided by Amela's girlfriend, who testified that he was an inactive member of an unnamed gang in North Hollywood. Thus, there was insufficient evidence that defendant committed his crimes for the benefit of a street gang. (*People v. Vang*, *supra*, 52 Cal.4th at pp. 1045-1046; *People v. Wright* (2016) 4 Cal.App.5th 537, 545; *People v. Franklin*, *supra*, 248 Cal.App.4th at p. 950.)

The Attorney General counters that there was sufficient evidence that defendant committed his crimes "in association with other gang members," namely, the "two members of the DAF." According to the Attorney General, defendant need not have been an active or current member of a gang to act in association with that gang. We need not resolve the issue of whether a non-gang member who commits a crime in concert with gang members may ever be found to have acted in association with a criminal street gang. (Compare *Johnson v. Montgomery* (9th Cir. 2018) 899 F.3d 1052, 1057 [two members of different gangs who commit crime together do not act "'in association with'" a gang; "it is not sufficient to simply commit any act in concert with a gang member, rather it is acting in concert with individuals of 'common gang membership' that satisfies the 'in association with' element of the gang enhancement"] with *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 425 [sufficient evidence that a defendant who was not a gang member acted "in association" with members of a gang, when he used the gang members to pick up and deliver drugs, collect money, rob and kill other dealers, and used their networks to distribute drugs].) We construe the Attorney General's argument to be that merely committing a crime in concert with members of any gang, even when the defendant is not a member of that gang,

is sufficient to demonstrate that defendant acted "in association" with a gang. We disagree. (*People v. Franklin, supra,* 248 Cal.App.4th at pp. 950-951 [finding insufficient evidence that defendant committed crimes in association with criminal street gang; defendant committed crimes with three friends who were members of other gangs, not defendant's]; *People v. Albillar*, *supra*, 51 Cal.4th at p. 60 ["Not every crime committed by gang members is related to a gang"].)

There was insufficient evidence to support a finding that defendant committed the crimes here for the benefit of, at the direction of, or in association with Palmas or DAF. We need not address whether defendant committed the crimes with the specific intent to promote, further, or assist in any criminal conduct by gang members. Accordingly, the true findings on the gang sentence enhancements must be stricken. (*People v. Franklin, supra*, 248 Cal.App.4th at p. 952.)

The firearm sentence enhancements must also be stricken. "Subdivision (e)(1) of section 12022.53 provides: 'The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of [s]ection 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).' . . . [¶] Section 12022.53's subdivision (e)(1) has this effect: Ordinarily, section 12022.53's sentence enhancements apply only to *personal* use or discharge of a firearm in the commission of a statutorily specified offense, but when the offense is committed to benefit a criminal street gang, the statute's additional punishments apply even if, as in this case, the defendant did not personally use or discharge a firearm but another principal did."

(*People v. Brookfield* (2009) 47 Cal.4th 583, 590.) Here, the evidence was undisputed that Cachu was the shooter. If the crimes were not committed in violation of section 186.22, subdivision (b), the firearm sentence enhancements would not apply. Because we conclude there was insufficient evidence to support a true finding that defendant committed the offenses pursuant to section 186.22, subdivision (b), the gang related firearm sentence enhancements pursuant to section 12022.53, subdivisions (b), (c), (d), and (e)(1) must also be stricken. We thus need not decide whether remand is necessary for the trial court to exercise its discretion pursuant to section 12022.53, subdivision (h), and whether the trial court erred by staying certain sentence enhancements.

We find it unnecessary to remand for resentencing as the trial court imposed the maximum possible sentence and there are no sentencing choices to restructure. Accordingly, it is appropriate for this court to modify the sentence on appeal. (§ 1260; *People v. Francis* (2017) 16 Cal.App.5th 876, 887.) We will modify the sentence by striking the gang and the gang related firearm sentence enhancements.

E. *Defendant Forfeited His Arguments that the Trial Court Erred by Imposing Fines and Fees without Determining His Ability to Pay*

Defendant asserts that the trial court erred by imposing a $40 court operations assessment (§ 1465.8), a $30 court facilities assessment (Gov. Code, § 70373), and a $5,000 restitution fine (§ 1202.4). Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157, defendant contends the trial court violated his due process rights

by imposing the court operations and court facilities assessments without considering his ability to pay them. Defendant further contends that the restitution fine must be stayed until the People demonstrate he has the ability to pay. We are unpersuaded.

Unlike the defendant in *People v. Dueñas, supra*, 30 Cal.App.5th 1157, defendant did not object below on the grounds that he was unable to pay, even though the trial court ordered him to pay a restitution fine in excess of the minimum.[5] Section 1202.4, subdivision (c) provides that a trial court may consider inability to pay when "increasing the amount of the restitution fine in excess of the minimum fine . . . ." Our Supreme Court has held that a defendant forfeits a challenge to the trial court's imposition of a $10,000 restitution fine for failing to consider his ability to pay if the defendant did not object below. (*People v. Nelson* (2011) 51 Cal.4th 198, 227.)

Defendant concedes that his trial counsel failed to object to the assessments or the restitution fine at sentencing. We conclude that on these facts, defendant waived his challenge to the penalty assessments. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154 [finding that defendant who failed to challenge assessments and maximum restitution fine at sentencing had forfeited his argument on appeal].)

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[5] Pursuant to section 1202.4, subdivision (b)(1), $300 is the minimum fine for felony convictions.

IV. DISPOSITION

The judgment is modified by striking the gang and firearm sentence enhancements on counts 1 and 2. As so modified, the judgment is affirmed. The trial court is directed to issue a new minute order and an amended abstract of judgment reflecting this modification, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

BAKER, Acting P.J.

MOOR, J.